

**BEFORE THE INDIANA CIVIL RIGHTS COMMISSION
319 State Office Building
Indianapolis, Indiana**

STATE OF INDIANA)
) SS
COUNTY OF MARION)

**ELAINE MATHIS AND
WILLIAM MATHIS**
Complainant,

CAUSE NO. 01286

vs.

EASTSIDE DOLPHIN CLUB, INC.
Respondent .

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 20, 1973, this matter was submitted for hearing before Charles L. Falvey, hearing member of The Indiana Civil Rights Commission. The Complainants were present in person and were represented by William H. Pearson, counsel for the Commission. The Respondent appeared by its president, Robert Freeman, and was represented by Marion W. Withers, Attorney. A portion of the evidence, of the parties and their witnesses was heard on February 20 1973, and the hearing was then continued until March 27, 1973; when the balance of the evidence was heard. Following conclusions of the evidence, the parties were given leave to file briefs. The brief of the Complainants was filed May 25, 1973. The Respondent has failed to file a brief with in the time allowed as extended and has failed to apply for a further extension of time.

Having heard and weighed the testimony of the parties and their witnesses and having examined the documents introduced into evidence by the parties and having considered the brief of the complainants, the hearing member now proposes the following Findings of Fact, Conclusions of Law (with a discussion of the questions of law raised by the complaint), and Order and recommends that they be adopted by the Commission.

FINDINGS OF FACT

1. The Complainants, William Mathis, Jr., and Elaine Mathis are husband and wife and at all time material to the complaint resident 3003 Lindberg Road, Anderson, Madison County, Indiana. Mr. and Mrs. Mathis are white. Eastside Dolphin Club, Inc. (the "Dolphin Club"), the Respondent, is a not-for-profit corporation, organized and existing under the laws of the State of Indiana, having been incorporated March 15, 1963. The purpose of the Dolphin Club as stated in its by-laws is as follows:

"The object of this club shall be to provide, acquire, operate and maintain facilities for swimming, tennis, and other forms of recreation of its members. Also to promote goodwill and sociability among the members and community."

2. The Dolphin Club operates a recreational facility on a not-for-profit basis in or near Anderson, Madison County, Indiana, consisting of a swimming pool, tennis courts and accessory improvements. The facility has been in operation continuously since the summer of 1966.
3. Use of the facilities of the Dolphin Club is limited to members of the club and their guests. At all times since the formation of the Dolphin Club, memberships have been solicited from white members of the general public resident in and near Anderson, Indiana. Memberships are available to heads of household, 18 years of age or older, and permit use of the Dolphin Club's facilities by the family of the member.
4. At all times since the formation of the Dolphin Club, cost of membership has consisted of an initiation fee, which was originally \$95 and which has subsequently been raised to \$145, and a membership fee, which was

originally \$300 and which has subsequently been reduced to \$200. In addition, membership requires the payment of annual dues of \$75 per family.

5. The by-laws of the Dolphin Club as originally adopted and as amended in July 1971, are silent as to the transferability of memberships. However, since its inception, the Dolphin Club has permitted the “sale” of memberships. This practice involves transferring credit for the membership fee. As of January, 1972, approximately 35 memberships had been sold and the practice continues. Ads occasionally appear in an Anderson newspaper for the sale of club memberships and the management of the Dolphin Club has voiced no objection to this practice.
6. The original by-laws of the Dolphin Club provided for both a Board of Directors and an “Advisory Board.” According to the original by-laws, applications for membership in the Dolphin Club required the endorsement of two members or one member of the Board of Directors. Under the by-laws as amended effective with the Dolphin Club’s 1972 season applications must be endorsed by two members or a member of the Board of Directors and require the approval of a Membership Committee appointed by the Board of Directors and the Board of Directors. There is no provision of blackballing in the by-laws of the Dolphin Club as originally adopted or as amended. In practice, approval of membership applications is perfunctory. No membership applications have been rejected since the formation of the Dolphin Club. Charles Newbury was a member of the Dolphin Club for five or six years. He served on the Membership Committee and the Advisory Board.
7. There are no black members of the Dolphin Club.

8. The Complainants became members of the Dolphin Club in June of 1966 and used the facilities regularly during the summer swimming seasons until July 1970. On July 1, 1970, Mrs. Mathis took a two-year old black child to the Dolphin Club as her guest. The usual guest fee was paid for the child. After Mrs. Mathis had been at the pool for some period of time on this occasion, Robert Freeman, General Manager and President of the Dolphin Club, approached her and told her to leave with the child. Mrs. Mathis did not leave and after approximately half an hour Freeman again approached her and ordered her to leave. Mr. and Mrs. Mathis continued to use the Dolphin Club for the balance of the season.
9. Immediately following the July 1, 1970 incident, Mr. Mathis phoned Mr., Freeman and arranged for a meeting with the Board of Directors of the Dolphin Club. This meeting occurred approximately 30 days following the incident. Four Directors of the Dolphin Club attended the meeting. They were Mr. Freeman, Lawrence Withers, Marion Withers and Dale Croxton. At this meeting Mr. Mathis was told by the spokesman for the Directors that he could resign and get a refund of his fees or that he could remain in the Dolphin Club if he agreed to abide by the rules. He was given to understand that this meant his family could bring no more black guests.
10. In the spring of 1971, Mr. Mathis tendered his dues for the 1971 season in advance of the due date and the tender was refused. On May 11, 1971 the Board of Directors of the Dolphin Club adopted a resolution declaring Mr. Mathis' membership to be forfeited. Mr. Mathis paid a membership fee of \$300 and an initiation fee of \$95 on joining the Dolphin Club and no portion of these fees has been refunded to him.
11. Lois Bridges is an adult black woman who lives in the Anderson community. She is the wife of Alvin Bridges, a black physician. She has attempted on several occasions to obtain a membership application for the

Dolphin Club and has consistently been refused. On one occasion her son was specifically excluded from a school related swimming party held at the Dolphin Club.

12. Shortly before the July 1 1970 incident involving Mrs. Mathis, the son of Judge Carl Smith, a member of the Dolphin Club, brought a black friend to the Dolphin Club as his guest. Mr. Freeman, Manager of the Dolphin Club, called judge Smith and complained about the incident.

DISCUSSION AND CONCLUSIONS OF LAW

The Indiana Civil Rights Law (I.C. 1971, 22-9-1, Burns 40-2307 through 40-2317) declares that it is the public policy of the State of Indiana to provide all of its citizens equal opportunity for access to public conveniences and accommodations and further provides that the practice of denying this right to qualified persons by reasons of race or color is a burden on the objective of the public policy of Indiana and shall be considered a discriminatory practice (I.C. 22-9-1-2, Burns 40-2308). The Indiana Civil Rights Commission, created by the Indiana Civil Rights Law, is empowered to receive and investigate charges of discriminatory practices and, if it finds after hearing that a person has engaged in a discriminatory practice, to issue cease and desist orders and such other orders that will effectuate the purposes of the Indiana Civil Rights Law, including but not limited to, orders for the restoration of the losses of complainants incurred as a result of discriminatory practices. (I.C. 22-9-1-6 (e), (j) and (k) (1).)

The evidence presented by the Complainants leaves no doubt that the Respondent denies use of its facilities to blacks as a matter of policy. Since the Respondent has failed to file a brief in these proceedings, it must be assumed that its defense is based solely on the grounds that the Respondent is a private club and as such is exempt from the public accommodation provisions of the Indiana Civil Rights Act. This is a fair assumption based largely on statements made by counsel for the Respondent at hearing and from the questions asked by counsel of the Respondent

upon cross-examination of the Complainants' witnesses. (The Respondent produced no witnesses at the hearing but extensively cross-examined the Complainants' witnesses including witnesses who are officers and employees of the Respondent.)

Unlike the federal Civil Rights Act of 1962, the Indiana Civil Rights Law does not contain a specific exemption in favor of private clubs in connection with its prohibition against discrimination in public accommodations. However, it may be argued that the definition of "public accommodation" contained in the federal Civil Rights Act implies such an exemption since it includes only establishments, which offer services, facilities or goods to the general public. For purposes of disposition of this complaint, the Commission will assume that this language does imply an exemption in favor of private clubs but it need not and does not by this decision adopt an official policy with respect to interpretation of the Act in this regard.

There are no reported Indiana cases interpreting the definition of "public accommodation" as that term is used in the Indiana Civil Rights Law. In this circumstance, the decisions of federal courts interpreting similar federal statutes are to be given great weight as persuasive authority. (See *Graves Trucking, Inc., v. B.G. Trucking Co.* ___ Indiana Appellate ___, 280 N.E. 2d 834 (1972).) The federal Civil Rights Act of 1964 also outlaws discrimination on the basis of race or color with respect to public accommodations. 42 U.S.C 2000 a (a). It creates an exemption to the coverage of the Act in favor of private establishments in the following language:

"The provisions of this subchapter shall not apply to a private club or other establishment not open to the public...
42 U.S.C 200 a (e).

In the circumstances, it is appropriate under the principle stated in the *Graves Trucking* case to look to federal court decision which determine the scope of the private club exemption under the Civil Rights Act of 1964 in determining what organizations might qualify for as private club exemption under the Indiana Civil rights Act.

In two recent cases the United States Supreme Court has determined that organizations whose structures and purpose were very similar to those of the Dolphin Club are not entitled to the private club exemption under the Civil Rights Act of 1964. (See *Sullivan et al. v. Little Hunting Park, Inc. et al.* 90 S. Ct. 400, 396, U.S. 229 (1969) and *Tillman et al. v. Wheaton-Haven Recreation Association, Inc. et al.* 93 S.Ct. 1090 ____ U.S. ____ (1973). As the Federal District Court for the Eastern District of Virginia observed in a decision rendered in July of this year, "...*Sullivan v. Little Hunting Park* has abolished traditional notions of what is 'private' insofar as these types of actions are concerned." *Gonzales v. Fairfax-Brewster, Inc.* ____ F.Supp. ____, 42 LW 2077 (1973).

Little Hunting Park was a Virginia nonstock corporation organized to operate a community park and playground facilities for the benefit of residents in the area of Fairfax, Virginia. Membership in the corporation entitled all person in the immediate family of the member to the use of the corporations' facilities. In reversing the trial court which had found that the organization was a private social club, the Court said:

"...we find nothing of the kind of this record. There was no plan or purpose of exclusiveness. It is open to every white person within the geographic area, there being no selective element other than race."

The evidence produced by the Complainants indicate that membership in the Dolphin Club is open to every white person in the Anderson area. There is no plan of exclusiveness. The elaborate membership screening procedures set out in the by-laws are inoperative. No evidence was introduced by the Respondent to show what, if any, criteria are used on passing on membership application. There is no provision in the by-laws for blackballing.

In 1973 Wheaton-Haven Recreation Association, Inc., case the Supreme Court considered the claim of private club exemption of a Maryland non-profit corporation organized for the purpose of operating a swimming pool. The Court found that the Association was "...essentially a single-function recreational club, furnishing only swimming and related amenities." Membership was by family unit and was limited to 325 families. Persons living within a three-quarter mile radius of the pool were given certain preferences with respect to membership openings. Only members and their guests were admitted to the pool. Mr. Justus Blackmun, speaking for a unanimous court and referring to *Sullivan v. Little Hunting Park, Inc.*, (cited above), said

"But here, as there, membership 'is open to every white person within the geographic area, there being no selective element other than race.' The only restrictions are the stated maximum number of memberships and, as in Sullivan, the requirement of formal board or membership approval. The structure and practices of Wheaton-Haven thus are indistinguishable from those of Little Hunting Park. We hold, as a consequence, The Wheaton-Haven is not a private club and that it is not necessary in this case to consider the issue of any implied limitation on the sweep of (U.S.C.A.) Sec. 1982 when its application to a truly private club, within the meaning of (U.S.C.A.) 2000 (a) (e), is under consideration".

The Court noted interestingly that only one applicant was formally rejected during the preceding 12 years of Little Hunting's operation and that only one applicant was rejected in the preceding 11 years of Wheat-Haven's operation. The Dolphin Club was organized in March, 1963, began soliciting memberships shortly thereafter and has been in operation at its present location since June of 1966. During that time no membership applications have been rejected.

CONCLUSIONS OF LAW

In view of the above Findings of Fact and the authorities discussed, the Commission makes the following Conclusions of Law:

1. The recreational facilities operated by the Respondent, Eastside Dolphin Club, Inc., are a public accommodation within the meaning of the Indiana Civil Rights Law.
2. The Respondent discriminates against black persons with respect to the use its recreational and related facilities in that it excludes black persons from membership and from use o the facilities as guests of members; such discrimination constitutes a continuing violation of the Indiana Civil Rights Law.
3. On July 1, 1970, the Respondent, through its president and general manager, excluded the Complainant, Elaine Mathis, and her black guest from use of its recreational facilities in violation of the Indiana Civil Rights Act.
4. The Respondent has terminated the membership in the Eastside Dolphin Club of the Complainants, Elaine Mathis and William Mathis, in reprisal for their bring a black guest to the Respondent's recreational facilities in violation of the Indiana Civil Rights Law.
5. The Complainants, Elaine Mathis and William Mathis, have suffered monetary damage to the extent of their membership fees and initiation fee totaling \$395 paid to the Respondent as a result of the Respondent's unlawful conduct.

6. The Complainants, Elaine Mathis and William Mathis, have been humiliated and have suffered mental anguish as a result of the Respondent's unlawful conduct.

7. The Respondent should be ordered to cease and desist from further violations of the Indiana Civil Rights Law and should further be ordered to adopt and implement an Affirmative Action Program to assure that its facilities are made available to all persons without regard to race, creed, color, national origin, or ancestry as is required by the Indiana Civil Rights Law.

ORDER

In view of the above Findings of Fact and Conclusions of Law, it is ordered by the Commission that:

1. the Respondent, Eastside Dolphin Club, Inc., cease and desist from barring persons from membership in the Eastside Dolphin Club on account of race or color and from barring guests of its members from use of its facilities on account of race or color;
2. that the Respondent, Eastside Dolphin Club, Inc., pay to the Complainants, Elaine Mathis and William Mathis, the sum of \$395 on account of pecuniary loss sustained by the Complainants because of their unlawful expulsion from the Eastside Dolphin Club and the further sum of \$250 as compensation for the humiliation and mental anguish caused the Complainants on account of the Respondent's unlawful action;
3. that the Respondent prepare an Affirmative Action Program designed to eliminate and prevent discrimination with respect to membership in the Eastside Dolphin Club and with respect to use of the Respondent's facilities by guests of its members on the basis of race, creed, color, national origin or ancestry; that such program provide for a system of reporting results to the Indiana Civil Rights Commission periodically and

that such proposed Affirmative Action Program be filed with the Indiana Civil Rights Commission within 60 day of the date of this Order, and that it be implemented immediately by the Respondent upon approval by the Director of the Indiana Civil Rights Commission;

4. that after the expiration of three years following the implementation of an Affirmative action Program pursuant to this Order, the Respondent may move to be excused from further periodic reporting with respect thereto; that if the Director of the Commission objects to such motion within 30 days after it is filed, the Commission shall conduct a hearing to determine whether and for what period the Respondent should be required to continue such reporting; that if the Director of the Commission fails to interpose and objection within 30 days following such motion, the requirement for further reporting will be terminated without further order of the Commission, and
5. that the Commission retain jurisdiction of this complaint until the requirement for further reporting of the results of the Affirmative Action Program established by the Respondent has been terminated pursuant to the terms of this Order.

Dated: September 14, 1973

**ADOPTION OF HEARING MEMBER'S
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

The Indiana Civil Rights Commission having reviewed and considered the above Findings of Fact, Conclusions of Law, and Order proposed by Charles L. Falvey, hearing member, adopts them as the Findings of Fact, Conclusions of Law, and Order of the Indiana Civil Rights Commission.